

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: NATIONAL PRESCRIPTION : *Case No. 1:17-md-2804*
OPIATE LITIGATION : *Cleveland, Ohio*
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FINAL PRETRIAL PROCEEDINGS : *Tuesday, October 15, 2019*
: *11:08 a.m.*
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TRANSCRIPT OF FINAL PRETRIAL PROCEEDINGS
BEFORE SPECIAL MASTER DAVID R. COHEN

Court Reporter: Donnalee Cotone, RMR, CRR, CRC
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
216-357-7078
donnalee_cotone@ohnd.uscourts.gov

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1 MR. ACKERMAN: I don't know that there was a
2 set deadline --

3 SPECIAL MASTER COHEN: David Ackerman.

4 MR. ACKERMAN: Yeah. David Ackerman.

11:17:11 5 I don't recall a set deadline that depositions had to
6 be finished by. What I do recall are two separate
7 deadlines. First there was a January 1st deadline, where
8 you stated that you would not allow any additional requests
9 for party depositions. And after January 25th, there
11:17:31 10 were -- there were depositions that went forward after that
11 date based on agreement of the parties due to things like a
12 witness unavailability prior to January 25th, or counsel
13 unavailability.

14 SPECIAL MASTER COHEN: Let me put it this way:
11:17:48 15 Were depositions done by March 4th? Were there depositions
16 that occurred after March 4th?

17 I'm seeing Kate say yes.

18 MS. SWIFT: Kate Swift for Walgreens. There
19 were a number of depositions that occurred after March 4th.

11:18:04 20 SPECIAL MASTER COHEN: Roughly when did they
21 end?

22 MS. SWIFT: July.

23 SPECIAL MASTER COHEN: And were those experts
24 and fact?

11:18:11 25 MS. SWIFT: There were at least fact

1 depositions. I don't recall whether -- there was a fact
2 deposition that was two days, July 11th and 12th. I don't
3 recall any expert depositions that late, but someone can
4 correct me.

11:18:25 5 MR. ACKERMAN: David Ackerman again.

6 Special Master Cohen, as I recall, those depositions
7 were DEA depositions, at least a number of them were in May
8 and June.

9 SPECIAL MASTER COHEN: Okay.

11:18:37 10 So here's the reason I ask: McKesson is requesting
11 depositions of three witnesses. I think that plaintiffs --
12 and that's Bornstein, Johnson, and Howard. I think that
13 plaintiffs are also asking for depositions of seven
14 pharmacist witnesses, preceded by the argument that those
11:19:13 15 seven pharmacist witnesses shouldn't be allowed at all.

16 And here's some rules that I'm thinking of applying
17 which would resolve these issues, but I also don't want to
18 take off the table the opportunity for the parties to work
19 this out amongst themselves, which I know they've been
11:19:35 20 trying to do, but it hasn't happened yet.

21 As far as I'm concerned, discovery is closed. It's
22 been closed for a long time. That includes depositions. If
23 y'all want depositions of witnesses yet to be called who
24 weren't deposed during the discovery period, that's
11:19:55 25 something you have to agree to, otherwise they don't occur.

1 I don't grant them.

2 It seems to me you had an opportunity during discovery
3 to take deposition discovery, and there are by a factor
4 probably of at least two folks you could have deposed, but
11:20:12 5 strategically couldn't and didn't. I get that. But
6 discovery is closed.

7 What that might mean is at trial you have to go
8 bareback -- hi, you're trial attorneys -- which means that
9 you would have to adduce evidence from witnesses at trial
11:20:25 10 whom you haven't learned what they said before they got
11 here. That's just the way it would go.

12 Another rule that I'm thinking might make sense, and
13 I've suggested certainly with regard to documentary
14 evidence, is if a witness wasn't disclosed during the
11:20:43 15 discovery period, which I defined to be ending at March 4th,
16 okay, because we all agreed that there was additional
17 discovery, whether it was because I said so or you guys
18 agreed to it, not January 25th.

19 So if a witness was identified during discovery before
11:21:02 20 March 4th, that witness can be called. If that witness
21 wasn't deposed, as I said, too bad, unless there's an
22 agreement.

23 What I believe that means is that the seven pharmacist
24 witnesses were identified before March 4th. What I believe
11:21:22 25 that means is that Bornstein and Johnson were identified

1 before March 4th, but Howard was not, and so that's how that
2 would play.

3 Now, there would be exception to that rule for
4 compelling circumstances, and so if there is a witness who,
11:21:50 5 for good reasons, is late identified after March 4th, and
6 whose presence at trial would be required to have a fair
7 trial, then that would be an exception, but that would be an
8 unusual set of circumstances, and I'm guessing that Howard
9 doesn't meet it. Howard wasn't identified until, I don't
11:22:12 10 know, two, three weeks ago, and I'm not thinking that Howard
11 is somebody without whom a fair trial couldn't occur.

12 Those two rules are entirely subject to Rule 3, which
13 is, you can agree otherwise. You can agree to call
14 witnesses who were not timely identified. You can agree to
11:22:34 15 depose witnesses who weren't deposed during the discovery
16 period. If you were to agree to that, then the deposition
17 ground rules would also have to be agreed to.

18 But that's all subject to your agreement, and I'm
19 happy to help you mediate those kind of, you know,
11:22:56 20 resolutions; but it's against that context, it's against
21 that background.

22 MR. ACKERMAN: Special Master Cohen, David
23 Ackerman.

24 Again, for the record, in our objections we identified
11:23:08 25 another five witnesses who were not disclosed during the

1 at the instance of the pharmacy defendants.

2 And so what that means is that there has to be some
3 sort of restrictions as to what the pharmacy witnesses can
4 say, would be allowed to testify about, and that would be
11:25:00 5 limited to SOMS, distribution, and diversion.

6 It's hard for me to tell certainly from the
7 descriptions that you provide what the pharmacy witnesses
8 will talk about. Walgreens says we will talk about pharmacy
9 managing, and Cardinal says we will have the four CVS
11:25:19 10 witnesses talk about whatever we need them to talk about in
11 response to plaintiffs' case. I can't tell what it is
12 defendants anticipate they will call those witnesses for and
13 what they hope to elicit from them, but it will not be the
14 case that they will get into the depths of dispensing unless
11:25:38 15 it relates to SOMS.

16 Now, what does that all mean? I don't know. I'm
17 giving you broad outlines for something we will have to
18 figure out going forward. I can't answer questions that I'm
19 sure you have right now about what exactly I mean, because I
11:25:50 20 don't know. We're probably going to have to get together,
21 and I'm going to somehow slice and dice what it is those
22 witnesses would be allowed to say; which suggests that it
23 might be a good idea to depose them so that I can understand
24 what it is that y'all are trying to adduce.

11:26:08 25 But those are my thoughts on the pharmacy witnesses.

1 One other thing: You will recall long ago, and this
2 kind of underlies all of this, that there were discovery
3 disputes about specific prescriptions and specific orders
4 and specific pharmacies, and how that all played out.

11:26:29 5 And Linda Singer sent a memo to the Court saying,
6 look, this is what we intend to do. We intend to prove our
7 case using an aggregate theory, but there are some things we
8 would do also, and she laid those out. And that includes,
9 for example, self-set restrictions on the extent to which
11:26:54 10 anecdotal stores would be used, and that still adheres.

11 So y'all can go back and look at that memo, but the
12 extent to which Bornstein, Howard, and Johnson are being
13 called to talk about or any witness is being called to talk
14 about a specific opioid experience, that's probably not
11:27:14 15 allowed. So I'm reminding you all of that now.

16 Let me stop there and ask if there are any questions
17 about any of that.

18 MR. SHKOLNIK: David, before depositions go
19 forward -- I'm sorry, Hunter Shkolnik.

11:27:34 20 Before the depositions of any pharmacists go forward,
21 wouldn't it be more appropriate if there was a proffer as to
22 what they want these witnesses to be testifying to so that
23 would help frame the issue for us going into these
24 depositions. And knowing if they're really talking about a
11:27:53 25 SOM system, that's one thing. If they're talking about,

1 well, we didn't fill this prescription or that prescription
2 for this reason, that may be a different issue we're going
3 to be covering.

4 So some type of real proffer, not a vague they're
11:28:07 5 going to talk about their job and what we do in pharmacies.

6 SPECIAL MASTER COHEN: It sounds like a
7 reasonable idea.

8 MR. STOFFELMAYR: Kaspar Stoffelmayr.

9 That might be a reasonable idea. I don't think we've
11:28:20 10 agreed that there are going to be depositions at all. That
11 may be part of this discussion you suggested we have. That
12 sounds like an element of something we should be to talking
13 about, but that's one of a number of elements, and that goes
14 to witnesses on both sides.

11:28:34 15 SPECIAL MASTER COHEN: Okay. Like I said,
16 there are some answers I can give you. This is the extent
17 of my thinking, and I know it needs more thinking and maybe
18 more specific rulings.

19 What I'm asking you to do, given what I've explained,
11:28:45 20 to meet and see if you can't figure something out. It
21 sounds like a proffer could be a good idea, it sounds like
22 depositions might be a good idea, it sounds like some horse
23 trading is possible. I suggest that you all pursue that.

24 Okay. So I mentioned that objections to witnesses is
11:29:09 25 something that I'm not going to deal with any further today,

1 although the Judge may. I don't know.

2 Just a moment.

3 The parties have been -- and I think it's been mostly
4 Kate Swift and Jane Conroy -- have been trading suggestions
11:29:39 5 on as we go through trial the timing of the swapping of
6 information, ranging from demonstrative exhibits to
7 objections to exhibits, to identification of witnesses, and
8 so on. And I think that you all have come to, as I
9 understand it, as of 10:30 last night, agreement on all but
11:30:02 10 the deadline for providing objections to exhibits that will
11 be used the next day.

12 So here's the problem: The problem is that -- well,
13 there's a couple of problems.

14 The first is that any agreement that y'all come to has
11:30:22 15 to be agreed to by Judge Polster. He hasn't seen this. I
16 have no idea whether he's going to agree to it. I'm going
17 to suggest that most of it makes sense, and we can do it.

18 The part that I'm most concerned about is I haven't
19 been told yet exactly what my role is going to be during the
11:30:37 20 course of this trial and what he's going to ask me to do.

21 It may be that he asks me to rule on objections to
22 exhibits, or it may not. I don't know. And I anticipate
23 that that will probably evolve.

24 My concern is that if he says, hey, Cohen, you're the
11:30:53 25 guy who's going to rule on these objections to exhibits, I